IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1938

No. 436

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FANSTEEL METALLURGICAL CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE.

A restatement of the essential facts is made necessary by inaccuracies and omissions of the Petitioner.

The proceedings before the National Labor Relations Board (herein called the "Board") grew out of the forcible seizure of Respondent's plant in a so-called "sit-down" strike. Upon the refusal of the men to surrender possession, they were promptly discharged for the seizure and retention of the buildings (R. 1781, 1766). An injunctional order to vacate the premises was openly defied and on two occasions the Sheriff's efforts to enforce the court writs were repulsed with violence. The forcible re-

tention of the plant continued from February 17 to February 26, 1937, when the Sheriff effected an eviction through the use of tear gas (R. 1782, 1783).

The sit-down strikers were members of Lodge 66, which was organized in the summer of 1936 under the leadership of the Steel Workers Organizing Committee (R. 184-5). A contract presented by Lodge 66 on September 10th was rejected by the Plant Superintendent because of its closed shop, check-off system and recognition provisions (R. 204, 212, 260-1). Under the mistaken impression that an appointment had been arranged, the Lodge 66 committee again called on the Plant Superintendent (Anselm) on September 21st, this time accompanied by its organizer. Anselm insisted that no appointment had been made, and thereupon the committee apologized for the intrusion and withdrew (R. 256, 285-6; 317).

Charges that the Respondent had failed to bargain collectively were then filed with the Board. These charges, heard during the present proceeding, were dismissed. The Board's decision holds that neither on September 10th nor September 21st did Lodge 66 represent a majority of the production and maintenance employees (R. 1956).*

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*The Board found that just prior to the September meetings Respondent had employed an undercover agent to engage in espionage against Lodge 66. The record discloses that the man in question completely severed his relationship with the Respondent at the end of November, 1936, almost three months prior to the plant seizure, and in no way participated in the matters in controversy before the Board (R. 379, 360-1, 365). It further appears from the Board's own stipulation that not a single employee was either discharged or disciplined for union membership or activity either as a result of the alleged espionage or otherwise (R. 1593). Throughout the period, officers and leaders of Lodge 66 participated in pay raises without discrimination (R. 365).

No further meetings were held or requested until February 17, 1937 (R. 287). In two meetings held that day with a large committee of Lodge 66, the Plant Superintendent declined their request that he confer with their outside organizer (R. 257-8; 298).

Within a half hour after the conclusion of the second conference and without notice or warning to the Respondent, about one hundred men forcibly seized Buildings 3 and 5, key buildings of the plant (R. 1762, *et seq.* 1780). Foremen and other employees were compelled to leave, with the warning that they had better do so "peaceably," and the buildings were then locked and barricaded from the inside (R. 1130). The seizure effected a complete stoppage in the operation of the entire plant (R. 1762, *et seq.*, 1780).

About four hours after the plant seizure, the Plant Superintendent and counsel for the Respondent sought entrance into the buildings and demanded surrender of possession. Upon refusal of the men to leave, and acting upon orders of the President, they announced in loud tones that all of the men remaining within the buildings were discharged for the violent seizure and retention of the premises (R. 1780-1). All the parties stipulated before the Trial Examiner that, at the time of the discharge of the men in Buildings 3 and 5, their number, their identity and their union affiliations, if any, with eight or ten exceptions, were totally unknown to the Respondent or anyone connected with its management, and that the discharge was a blanket discharge of all of the men then in occupation of the buildings (R. 1781).*

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*Throughout the Petition the contention is urged that the sit-down strikers were never actually discharged. The discharge was alleged in the sworn charge filed by Lodge 66 and in the Board's complaint and was admitted in the

The next morning the Respondent filed a complaint for an injunction in the Circuit Court of Lake County, Illinois. After full hearing at which counsel for Lodge 66 and the individual defendants appeared and were heard, the Circuit Court entered a mandatory injunction directing that the buildings be vacated and possession restored to the Respondent (R. 1780-1, 1763-4). Upon being served with the injunction by the Sheriff, the men refused to comply and announced their intention to hold the buildings (R. 1782, 1767-8).

The Circuit Court then issued a writ of attachment directing the Sheriff to arrest the men remaining in the buildings and bring them before the Court to show cause why they should not be held in contempt. On the morning of February 19th, the Sheriff, accompanied by about one hundred deputies, attempted to enforce the writ of attachment. Upon being served with copies of the writ, the men refused to come out. Thereupon, the deputies attempted to force an entrance into Building 5. With axes and battering rams they succeeded in breaking down one door, only to be met by pressure streams of fire extinguishing chemicals fed from huge tanks and directed by the men on the inside (R. 1807, 1769; 1089; 1124-1133). At the same time, the men on the upper floors of both buildings began bombarding the Sheriff and his deputies with large quantities of sulphuric acid and heavy steel and iron mis-

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answer. The discharge was also acknowledged by all parties in a stipulation of fact. The sole issue was whether the discharge was for good cause. The Board dismissed the portion of the complaint alleging discharge for union membership or activity. The Circuit Court of Appeals held that the fact of discharge for proper cause could not be open to question, and, indeed, there is *no* evidence to the contrary. For a complete statement of the record, see *infra* pp. 22-24.

siles, including pipes, bolts, nuts, reamers, wire reels and sharp end tools. The sulphuric acid was particularly terrifying as it was poured from windows and hurled in quart bottle containers at the Sheriff's men below (R. 1815, 1090; 1092). A number of deputies were burned by the sulphuric acid and other deputies were injured by the heavy flying missiles (R. 1120-1; 1771). To protect his men, the Sheriff withdrew and employed tear gas in an effort to dislodge the occupants of the buildings. That served only to increase the intensity of the acid and missile barrage, and the Sheriff and his deputies were compelled to withdraw (R. 1770).

The sit-down strikers continued their occupancy of the buildings until the morning of February 26th.* That morning the Sheriff and his deputies again attempted to enter the buildings. A more violent counterpart of the first resistance then ensued. Tools, reels and other heavy missiles, intermingled with quart bottles of sulphuric acid, were again hurled from the windows at the law enforcement officers (R. 1771). It was stipulated that the Sheriff was then compelled to use tear and emetic gas in order to evict the occupants and restore possession of the buildings to the Respondent (R. 1783).

Sixty-six of the men named in the complaint were admittedly participants in the violent seizure and retention of the plant and appear to have had full knowledge of the injunction.† It was stipulated that fourteen of the men

*During this interval they were amply supplied from the outside with food, clothing, beds, bedding, stoves, radios, home equipment and supplies (R. 1784-5, 1821).

†The writ of injunction and the writ of attachment had been read to the men through open windows and a large number of copies were passed into the buildings, and twice

named in the complaint, knowing of the injunction, procured and delivered the food, equipment and other supplies mentioned, for the express purpose of enabling the occupants of the buildings to retain their possession (R. 1784-5).

Thirty-seven of the sit-down strikers were convicted of contempt by the Circuit Court and were fined and sentenced to jail. Twenty-four received $100.00 fines and 10-day sentences, eleven received $150.00 fines and 120-day sentences, and two received $300.00 fines and 180-day sentences. The hearings with respect to the baiance of the men were continued by the Court on its own motion (R. 1738-61).* An appeal from the contempt sentences resulted in an affirmance by the Appellate Court of Illinois for the Second District (295 Ill. App. 323). The Supreme Court of Illinois denied leave to appeal on October 17, 1938, rendering the contempt order final.

A large and direct loss was inflicted upon the Respondent by the men participating in the plant seizure and in the violent resistance to the Sheriff. Most of the windows and much of the sash had been broken to obtain air for combating gas and to provide openings for the missiles thrown at the Sheriff's men (R. 1823-7, 1179, 1091). Other parts of the building interiors were damaged. Further physical destruction included the loss of numerous small

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daily there were delivered to both buildings Chicago and Waukegan papers prominently displaying accounts of the occupation of the plant, the injunction and the unsuccessful efforts of the Sheriff toward enforcement.

*A full hearing on the merits of the case then ensued and a final decree embodying full findings of fact was thereupon entered, without objection by counsel for the defendants, and no appeal has ever been prosecuted therefrom (R. 1762).

tools and parts, many of which had been hurled through the windows, large quantities of sulphuric acid, 50,000 valuable contact points, and other inventory materials dropped from the windows on the deputies, two furnaces which were permitted to cool rapidly and burn out, general building damage occasioned by foamite and other chemicals in the fire extinguishers, the ruin of a large Niagara shear sprayed with foamite, and other physical injury occasioned by the use of the buildings for living quarters (R. 1095, 1099, 1123, 1180, 1817-28). Machinery rusted and was otherwise damaged by exposure and lack of care. The President of the Respondent, whose testimony was uncontradicted, computed its direct loss to aggregate $62,000.00 (R. 1181-2).

In announcing the reopening of the plant after ten days of repair and rehabilitation work, the President of the Respondent issued the following public statement:

> "All of the men who participated in the sit-down strike were discharged by the company. It has been the company's consistent belief that more than half of the eighty men who participated in the seizure of the plants were compelled to do so through coercion and intimidation. Applications for reemployment from such men will receive favorable consideration.
>
> "We cannot condone the defiance of the courts or the resistance with violence to the enforcement of the law. For the men who participated in such unlawful activities, there can be no place in our plant" (R. 1336).

Twelve of the men who had voluntarily left or escaped from the buildings before the eviction, and twenty-three who remained throughout the period, filed applications for reemployment and were hired (R. 1772, 1784). Such

reemployment did not extend to men who were thereafter sentenced for contempt by the Circuit Court. Many old employees returned and empty places were filled by new applicants. Sixty-one men and women who returned to work were members of Lodge 66 and they were reinstated without any condition as to union membership or activity (R. 1212-13, 1339).

With the resumption of operations came plant changes in the interest of more economical operation. As a result of this internal reorganization, numerous jobs were completely abolished and others were materially altered, effecting substantial savings (R. 1182-92). Many of the jobs so eliminated had previously been occupied by persons named in the complaint and ordered reinstated by the Board (R. 1829, 1831, 1291, 1298-9).

About the middle of April, 1937, an independent labor organization came into being at the plant (R. 963). Hourly production employees joined together to create the Rare Metal Workers of America, Local No. 1 (R. 1020-2). Supervisory employees were excluded from membership and did not participate either in the organization of the Union or the management of its affairs (R. 1003, 1020-2). Because the Respondent permitted the new organization to hold its two initial meetings in a company building and to mimeograph notices on its machines and post them on the bulletin boards, the Board held that the Respondent had supported and dominated the organization.* All of the evidence showed the organization free from management

*The evidence showed that the organizing committee had sought to rent, but had been refused the use of, public halls in the community by reason of fear of bombing or other violence (R. 977, 979). Because of that fact, the committee asked for and received permission to use an unoccupied floor of a company building.

domination (R. 954, 920, 921, 955-7, 985, 989, 990; 1018, 1020). While the Circuit Court of Appeals said that there was substantial evidence to sustain the finding of support (as distinguished from domination), the order of disestablishment was set aside.

Respondent's Contentions.

With reference to the grounds for certiorari alleged by the Petitioner, the contentions of the Respondent are as follows:

I.

A. The Court below sustained the Respondent's discharge of sixty-six employees for forcibly seizing and retaining the Respondent's plant. This decision gave effect to the prior determination by this Court that "the act permits the discharge for any reason other than union activity or agitation for collective bargaining with employees." *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. The fundamental principle having been established by this Court, no new or "vital" question is presented for review.

B. The facts, the reasoning and the decision in *National Labor Relations Board* v. *Columbian Enameling & Stamping Co., Inc.*, 96 F. (2d) 948, are totally unrelated to those of the case at bar. The *Columbian* case was neither relied upon nor cited in any of the three opinions in the Circuit Court of Appeals. The affirmance or reversal of the *Columbian* case will neither control nor affect the decision in the case at bar.

II.

The decision below is in full accord with the Fourth Circuit Court of Appeals decision in *Standard Lime &*

Stone Co. v. *National Labor Relations Board,* 97 F. (2d) 531, and the Fifth Circuit Court of Appeals decision in *Peninsular & Occidental S. S. Co.* v. *National Labor Relations Board,* 98 F. (2d) 411. In both the Second and Ninth Circuit cases cited in the petition, there were express findings of discharge for union activity. Those cases do not conflict with the decision in this case, predicated as it is upon a discharge for admittedly good cause.

III.

The order of the Circuit Court of Appeals gives effect to both the provisions and objectives of the National Labor Relations Act. The Court's finding of a discharge of sit-down strikers and a valid refusal of reinstatement to other employees for the reason that their jobs were abolished or that they were shown to be inefficient involved questions of fact and not statutory construction. On the remaining questions raised under Point III of the petition, the order of the court below is in complete harmony with the views expressed by other Circuit Courts of Appeals and by this Court.

ARGUMENT.

I.

No new or "vital" question is presented for review by the order sustaining the discharge of sixty-six employees for the forcible seizure and retention of Respondent's plant. The fundamental principle that the Wagner Act permits discharge for good cause has heretofore been established by this Court.

> "The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. * * * The petitioner [employer] is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible." *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 132.

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.* 301 U. S. 1, 45, 46.

Thus, twice, in the course of comprehensive analyses of the scope of the entire Act, did this court uphold the funda-

mental right of discharge. While the discharge of striking employees was not there specifically in issue, the reservation to the employer of the basic right of discharge for proper cause was emphasized by this Court to demonstrate that the statute was confined to proper constitutional limits. The implication was left that an invasion of that right would contravene the Fifth Amendment to the Constitution of the United States. Indeed, it is clear from *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, 349, that an employer's right of discharge for cause totally unrelated to the purposes of the legislation could not be constitutionally abridged.

In the face of these decisions, Petitioner insists that an employee who ceases work by reason of a labor dispute or an unfair labor practice acquires immunity from discharge for any cause. Reliance is had on Section 2(3) of the Act providing that the term "employee" shall include "* * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice * * *." The Senate Committee Report discloses that this provision was designed to recognize the "principle that men do not *lose* the right to be considered as employees for the purposes of this bill merely by collectively refraining from work during the course of a labor controversy."* The purpose of this provision was to secure strikers in their status as employees—not to provide them with a cloak of immunity from discharge for proper cause.† There is no

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*Rept. No. 573, Senate Committee on Education and Labor, 74th Cong., First Sess., p. 6.

†To show a contrary Congressional intent, Petitioner cites the proposal by a witness before the Senate Committee, during its hearings, that the definition of employee exclude strikers guilty of violence (Pet. p. 17). That un-

Congressional intent that ceasing work in connection with a labor dispute shall confer a license for plant seizure, violence or other acts ordinarily constituting legitimate grounds for discharge. The position of an employee ceasing work in connection with a labor dispute or as a consequence of an unfair labor practice is no different—no better and no worse—than that of his brother who remains at work. Both remain subject to discharge for proper cause—which, in the words of this Court, means "any reason other than union activity or agitation for collective bargaining."

Giving effect to the "undoubted right" of the employer, declared by this Court, the Court below sustained the Respondent in its discharge of sixty-six men for forcibly seizing and withholding its plant. This right of discharge is the paramount issue to review which certiorari is sought. The decision of the Circuit Court of Appeals applies the principle established by this Court. A redeclaration is unnecessary.

Unmentioned by the Petitioner are the discussions of the right of discharge in the *Associated Press* and

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authorized statements of witnesses at Congressional hearings have no probative value in determining the Congressional intent has been held by this Court in *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 493, reversing 42 F. (2d) 408, 411, 412. What is in point is the fact that the Congress had before it decisions of the old Labor Board, headed by Senator Wagner, the author of the present Act, holding that violence or lawlessness during a strike bars reinstatement of employees.

In re National Lock Company, No. 52, Dec. Feb. 21, 1934.

In re American Stores, No. 239, Dec. June 29, 1934.

In re Eagle Rubber Company, No. 219, Dec. May 16, 1934.

Jones & Laughlin cases and the express holding of the Fourth Circuit Court of Appeals that striking employees are subject to discharge for good cause. See *Standard Lime & Stone Co.* v. *National Labor Relations Board*, 97 F. (2d) 531 (certiorari not applied for). Instead, the Petitioner seeks to ride into this Court on the coat tails of *National Labor Relations Board* v. *Columbian Enameling & Stamping Co., Inc.*, No. 229, in which certiorari has heretofore been granted. Not only is there a complete diversity of facts, issues and underlying doctrines in the two cases, but the *Columbian* opinion was neither considered, nor even mentioned, in any of the three opinions filed in the Circuit Court of Appeals in this case.

In the *Columbian* case, the Circuit Court of Appeals held that, by striking in violation of their contract, the employees terminated their employment relationship and were "estopped" to claim reinstatement. Our crucial question—namely, the employer's right to discharge striking employees on legitimate grounds—was not there remotely involved. There was no discharge in the *Columbian* case either, for proper cause as in this case, or for any other cause. The *Columbian* case was concerned solely with the legal effect of a strike undertaken in alleged violation of a contract. That case held that going on strike in the face of a prohibitory contract automatically destroyed the employee status, notwithstanding the express statutory provision that a strike, itself, shall not sever the employment. In the case at bar, the Court assumed that, upon ceasing work, the sit-down strikers continued as employees, but held that such status could be, and was, terminated upon the same legitimate grounds as would warrant the dismissal of a working employee.

Apart from the total dissimilarity in facts and holdings, the opinions in the present case and those in the

Columbian case reflect a wide divergence of approach. Judge Evans rested the majority opinion in the *Columbian* case upon a private rights theory, holding that the strikers, having violated their contract, were estopped from claiming an employee status. Petitioner argues that the same doctrine was adopted in the present case. Nothing could be farther from the truth. No question of private rights or estoppel against the employees or the Board was raised in this case; recognition was simply given to the inherent limitations imposed by the Congress upon the reinstatement power of the Board. The statute expressly requires that persons reinstated must be "employees." The sit-down strikers, having been properly discharged, the Court held that, as a matter of law, the Board was powerless to order reinstatement of such non-employees.*

In a further effort to tie the present decision to the unrelated *Columbian* case, Petitioner argues that in both cases misconduct of employees was held to excuse unfair labor practices, and, upon that premise, the cease and desist portions of the Board's order were not enforced. Whatever may have been true in the *Columbian* case, the Respondent in its argument and the Court in its decision relied upon the employees' misconduct solely as a ground for the discharge and refusal of reinstatement.

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*Added evidence of the vital difference between the two cases appears from the facts, *first*, that Judge Sparks, who wrote the opinion-in-chief in the instant case, concurred only in the conclusion in the *Columbian* case, thereby rejecting the estoppel or private rights theory for which that case stands, and *second*, that Judge Treanor, who dissented in both cases, here rests his dissent upon an entirely different ground, namely, that the employee status is perpetually preserved to striking employees as a matter of law (R. 1991).

The following excerpt from the opinion in chief completely refutes the Board's contentions:

> "It is urged by the Board that the commission of a crime by strikers does not preclude their right to bargain with petitioner. This we admit, provided they still are employees and represent a majority of all. What we hold is that there was just cause for discharge, it was exercised, and those who have not been re-employed are not employees and were not at the time of the finding and order of the Board. The present employees still have their rights of bargaining without interference of the petitioner, and these may be enforced upon proper procedure." (R. 1989)

The elimination from the rolls of the dismissed employees had completely dissipated any majority that Lodge 66 might have enjoyed on February 17, 1937. The "proper procedure" suggested by the Court is obviously an election reflecting the current desires of the present employees rather than those expressed more than two years ago, principally by men who have ceased being employees. That view is amply supported by *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 869 (C. C. A. 2d), cert. den. 82 L. Ed. 1042.

II.

The decision of the Court below is in full accord with the decision of the courts of other circuits dealing with the same issues. The Second and Ninth Circuit decisions cited in the petition to show a conflict expressly involved discharge for union activity.

Counsel for the Petitioner construe *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C.

C. A. 9th) to hold that as a matter of law, under Section 2(3) of the Act, a discharge of strikers cannot terminate their employee status. Predicated upon that unfounded construction of the *Carlisle* case is the allegation of conflict between the circuits.

The *Carlisle* case did not deal with discharge for good cause. The men were there discharged as punishment for going on strike. The employer's right to discharge striking employees for good cause was neither considered nor determined. To anticipate and avoid this fundamental distinction, the Petitioner argues that the *Carlisle* discharge, having occurred prior to the effective date of the Act, must be treated as a discharge for "good cause" although it was inspired by, and used as punishment for, union activity. The *Carlisle* opinions take no such position. Admittedly under the Act, the employee status may not be terminated for going on strike. The *Carlisle* opinions while professing the contrary actually apply that limitation of the Act *retroactively*. The fact that the strike began, and the punitive discharge occurred, prior to the effective day of the Act was held immaterial. The Court said:

> "It is likewise clear that the individuals, that is, the union employees, ceased their work in order to sustain their position in the controversy. *Under the act*, therefore, the union members were 'employees.' • • • There is no limitation in the statute that individuals whose work has ceased as a consequence of a current labor dispute are employees only if they were not discharged prior to the effective date of the act." (Italics supplied.)

And the concurring opinion points out that even prior to the Act the common law recognized that the status of "striking employees" could not "be completely negatived

by the simple method of discharging the men." The supplementary opinion recently handed down in the same case confirms the retroactive application of the Act and refutes the interpretation placed upon the *Carlisle* case in the petition. *National Labor Relations Board* v. *Carlisle Lumber Co.*, (Decided Oct. 15, 1938).

Directly in point and completely supporting the decision of the Court below is the opinion of the Fourth Circuit Court of Appeals in *Standard Lime & Stone Co.* v. *National Labor Relations Board*, 97 F. (2d) 531.* The Board had there directed the reinstatement of eight employees convicted of conspiracy to dynamite company property. Although there was no affirmative dismissal, the company refused reinstatement upon the basis of that lawless conduct. In upholding the employer's right to discharge or refuse reinstatement to a striking employee guilty of illegal conduct, the Court said (at page 535):

> "The company had announced that it would not consider any worker as an employee who failed to return to work on June 13. In this broad position it was not justified, as we have already indicated; but on July 15, when the request of the Union for further negotiations was made, it could lawfully decline to recognize as employees confessed offenders who had previously broken the law. The right of an employer to discharge or to refuse to reinstate a man who has committed a crime which endangers the safety of his fellow workers or the integrity of the plant cannot be successfully challenged. The statute does not purport to destroy this right, or contemplate that an employer must continue to employ or to treat as

*No application was made to this Court for certiorari in the *Standard Lime & Stone Co.* case.

> employees men who have engaged in unlawful conduct of this character. Nor would such an interpretation effectuate the policies of an act designed to remove the sources of industrial strife by encouraging the friendly adjustment of industrial disputes. Sections 1 and 10 (c) of the Act, 29 U. S. C. A. §§ 151, 160 (c)."

In reaching this decision, the Fourth Circuit Court of Appeals expressly gave effect to the views expressed by this Court in the *Associated Press* and *Jones & Laughlin* cases.

Applying the same authorities, the Fifth Circuit Court of Appeals has held that the seizure of the employer's property in a so-called sit-down strike or even threatened participation therein warranted dismissal. *Peninsular and Occidental S.S. Co.* v. *National Labor Relations Board*, 98 F. (2d) 411, 415.

Another element of conflict charged by the Petitioner concerns the holding in *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 869 (C. C. A. 2d), and *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), that misconduct of employees does not excuse the employer's unfair labor practices. With that view, there is no disagreement in the present case. The pleadings and the Court's opinion amply disclose that the misconduct of the employees was urged and recognized solely as a ground for discharge and refusal of reinstatement and *for no other purpose.* The very same straw man was set up by the Board before the Circuit Court of Appeals and was struck down by the Court with the following words:

> "It is urged by the Board that the commission of a crime by strikers does not preclude their right to

bargain with petitioner. This we admit, provided they still are employees and represent a majority of all'' (R. 1989).

The refusal to enforce collective bargaining with Lodge 66 was not grounded upon the misconduct of the union or its members but rather upon the commanding fact that the union had lost its majority.

III.

The order of the Circuit Court of Appeals gives effect to both the provisions and the objectives of the National Labor Relations Act.

1. The Board's order of disestablishment of the independent union was predicated upon a finding that the Respondent had supported, and in addition had interfered with and dominated, the organization (R. 1965). The court noted that there was evidence to sustain a finding of support, but did not accept the Board's finding of domination and interference (R. 1987). Not a single instance of interference or domination was cited in the Board's own decision, and there is none in the evidence (R. 1962-5). Not a scintilla of evidence of solicitation or encouragement of membership appears in the record. The Board's decision was confined to the single element of support.*

The test of any disestablishment order must be whether or not the employees have been deprived of a freedom of

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*The support consisted only of permitting the use of vacant space for its organization meetings when fear of violence rendered public halls unavailable, and the use of mimeograph machines for the preparation of, and bulletin boards for posting, two or three notices and ballots.

choice.* That a union capable of functioning independently, even though originally inspired by the employer, ought not be dissolved or even lose recognition rights was suggested by this court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270. Not one of the characteristics condemned by this court in the *Pennsylvania Greyhound Lines* case stigmatizes the Rare Metal Workers of America, Local No. 1. The Circuit Court of Appeals properly indicated that any question as to the freedom of adherence to that union can best be settled by proper procedure, namely, a secret election conducted by the Board.

2. The first date on which Lodge 66 was shown to have represented a majority was on February 17, 1937, the day of the sit-down strike. Charges which the Board ultimately dismissed were then pending before the Board. Impatient with the orderly processes created by the Act, members of Lodge 66 took the law into their own hands and seized Respondent's plant. For that seizure and the refusal to surrender possession of the plant, they were promptly and properly discharged. Notwithstanding that Lodge 66 had lost its majority, the Board directed the Respondent to recognize it as the exclusive bargaining agent of all employees,—an order contrary to the Act and destructive of its objectives. The refusal to enforce that portion of the order was proper and conforms with *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 869, 870.

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*Report No. 573 of Senate Com. on Education and Labor, 74th Cong., 1st Sess., p. 10; Report No. 1147 of House Com. on Labor, 74th Cong., 1st Sess., p. 18. Cf. *In re Consolidated Edison Company of New York*, 4 N. L. R. B. 71; *In re Standard Lime & Stone Co.*, 5 N. L. R. B. #15.

3. For the first time in the Circuit Court of Appeals, the Board advanced, and now repeats, the contention that the sit-down strikers were never discharged. The entire case, from its inception, proceeded upon the premise, asserted and recognized by all parties including the Board, that these men had been discharged. The record is as follows, all italics being supplied:

(1) The amended charge, filed under oath by Lodge 66, alleges that:

> "*the company did discharge 95 of its employees on February 17, 1937,* for the reason that they were members of Lodge 66, Amalgamated Association of Iron, Steel and Tin Workers of North America, and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection" (R. 33).

(2) Upon the basis of that charge, the Board issues its complaint, alleging that:

> "on February 17, 1937 while engaged in operations at the North Chicago plant, as above described, Respondent, acting by and through its officers and agents, *caused to be discharged the following employees*: [listing 92 persons] and each of them, for the reason of their membership in the union and that they engaged in concerted activities for the purpose of collective bargaining and for other mutual aid and protection" (R. 28).

(3) The answer admitted the discharge and raised as the sole issue the reason for the discharge, stating:

> "Respondent denies that on February 17, 1937, or on any other date, it discharged any of the per-

sons named in Paragraph 8 of the complaint, or any other persons by reason of membership in the Steel Union, or in any other union, or by reason of lawful concerted activities for the purpose of collective bargaining. * * * Respondent further avers that the *only persons named in Paragraph 8* of the complaint *who were discharged* by the Respondent *were those who had participated in the violent seizure* and unlawful retention of possession of Respondent's property, as hereinbefore set forth, and who *were discharged,* as hereinbefore set forth, solely by reason of such violence and unlawful conduct and for no other reason whatsoever" (R. 73).

(4) To state facts *not in dispute,* all of the parties—the Board, Lodge 66 and the Petitioner—entered into a stipulation of facts before the Trial Examiner, which was admitted into evidence as Respondent's Exhibit No. 7. The stipulation states that upon the refusal of the men to surrender possession, the company informed the sit-down strikers "that every man remaining in the buildings was discharged for the violent seizure and retention of the buildings" (R. 1781). The stipulation continues:

> "*At the time of the discharge* of the men in Buildings 3 and 5, their number and their identity and their union affiliations, if any, with 8 or 10 exceptions, was totally unknown to Mr. Aitchison, Mr. Anselm, Mr. Swiren, or any one connected with the management of the company, and *the discharge was a blanket discharge of all the men then within the buildings*" (R. 1781).

(5) The record further includes the final decree entered by the Circuit Court of Lake County in the proceeding to which Lodge 66 and substantially all of the

individuals involved were parties. The decree makes the express finding that:

> "• • • on February 17, 1937, the Plaintiff called upon the Defendants and all other persons who had so forcibly seized and occupied Plaintiff's premises, to evacuate the premises and the Defendants and the other persons in possession of the Plaintiff's plants having refused this demand, Plaintiff thereupon *discharged* from its employ for such unlawful and violent seizure of Plaintiff's property and plants, each of the Defendants and each of the other persons in possession of Plaintiff's premises" (R. 1766).

(6) Upon this record the Board held that the Petitioner's action was not a "discriminatory discharge."*

Upon this record the court was compelled to hold that there was a *bona fide* discharge for good cause, saying:

> "There seems to be no denial by the Board that there was ample cause for discharge. Indeed, in the argument before this court the Board admitted that the men in conducting a sit-down strike and resisting the officers 'did a foolish and illegal act.' Certainly it cannot be denied that an employer is warranted in discharging his employees and severing that relationship, when they take and retain exclusive possession of his property against his will. • • • What we hold is that there was just cause for discharge, it was exer-

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*The petition completely ignores this record. Instead it is urged that Respondent could not have "intended" the discharge because it subsequently *re-employed* some of the men. The Respondent's statement, issued at the time of the reopening of the plant, *supra* page 7, fully explains the basis for the re-employment. See also opinion-in-chief, R. 1988.

cised, and those who have not been reemployed are not employees and were not at the time of the finding and order of the Board." (R. 1987-8, 1989).

4 and 5. Upon the review proceedings before the Circuit Court of Appeals, the Respondent objected to the reinstatement provisions of the Board's order upon the following grounds:

First, that sixty-six sit-down strikers had been discharged for good cause;

Second, that the sixty-six sit-down strikers and the fourteen aiders and abettors who, it was stipulated, made the continued occupancy of the buildings possible through the furnishing of supplies, were guilty of a violation of the injunction of the Circuit Court of Lake County, a violation of the Criminal Code of Illinois,* the wilful destruction of property and violent resistance of law-enforcement officers, and that their reinstatement could not effectuate the policies of the act;

Third, that in a *bona fide* reorganization, almost forty jobs, some of which were occupied by sit-down strikers and some by others named in the complaint, had been completely abolished;

Fourth, that upon grounds of inefficiency, respondent objected to the reinstatement of seven individuals whose membership in the Union was unknown to the respondent and who had not participated in any union activity.†

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*Ill. Rev. Stat. 1937, Ch. 38, §§ 376-8.

†There was also a miscellaneous group of seven, including a foreman discharged after the strike, three who joined the Union after their discharge for inefficiency, etc. (R. 467-8, 1217-25, 1897, 1905, 1283).

The factual soundness of that position was never challenged by the Board. The *bona fide* character of the internal reorganization and the inefficiency of the seven individuals in question are not denied in the Board's decision or findings. The Board dealt with the last two groups by directing Respondent to reinstate all of the men and women involved and then carry out a new internal reorganization, discharging those for whom there were no jobs or who were inefficient. That the Board was without power to make such an order was conceded even in the dissenting opinion of Judge Treanor, in these words:

> ". . . there is no provision in the Act which purports to qualify the right of an employer to abolish unnecessary jobs either during the pendency of a labor dispute or after the commission of an unfair labor practice by an employer. In short, the National Labor Relations Act . . . does not protect striking employees from disadvantages which result from normal management action taken by the employer during the time the striking employees voluntarily refuse to work." (R. 1998).

There is unanimity of opinion among the Circuit Courts of Appeals that the Board has no power to order reinstatement of persons whose jobs no longer exist. *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 91 F. (2d) 509 (C. C. A. 5th), *Black Diamond S.S. Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2nd), cert. den. No. 872, October Term, 1937.

CONCLUSION.

Neither the seizure nor the destruction of property can be defended as legitimate union activity. The judicial condemnation of the sit-down strike has been universal; its illegality cannot be doubted. Certainly it constitutes more than ample cause for the discharge of the participants.

Neither union sanction for their illegal conduct nor the usurpation of the "strike" label can shield participants in sit-down strikes from the discharge which the National Labor Relations Act permits and this court has twice recognized. The decision of the Circuit Court of Appeals conforms strictly to both the statute and the decisions of this court; it is also in complete harmony with applicable decisions in other circuits. The petition for certiorari should be denied.

Respectfully submitted,

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